

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

AMADEO SANCHEZ,) 3:11-cv-00273-LRH (WGC)
Plaintiff,)
vs.) **ORDER ON MOTION FOR STAY OF
DISCOVERY OR ALTERNATIVELY,
MOTION FOR ENLARGEMENT OF TIME
(FIRST REQUEST) (DOC. # 41)**
STATE OF NEVADA, *et al.*,)
Defendants.)

Before the court is defendants' Motion for Stay of Discovery, or Alternatively, Motion for Enlargement of Time (First Request). (Doc. #41.)¹ Defendants seek to stay plaintiffs' discovery.² Alternatively, defendants seek to enlarge the time to respond to plaintiffs' discovery until after the district judge rules on defendants' request for a stay which was incorporated into defendants' Objection (Doc. # 35) to the issuance of a scheduling order. (Doc. # 41.)

Before getting to the merits of defendants' requests, the court will clarify and correct certain aspects of the case history described in defendants' motion.

First, defendants apply inappropriate significance to the Minutes of the October 20, 2011 status conference (Doc. #19). (See Doc. # 41 at 2.) The minutes are clear that: (1) a scheduling order was to

¹ Refers to the court's docket number.

² Defendants fail to comply with LR 26-7 which requires the full text of the discovery sought be set forth in full in a discovery motion, and that the parties meet and confer before filing a discovery motion.

1 be issued; and (2) defendants were to file a responsive pleading by November 9, 2011. (Doc. # 19.)
 2 The issuance of the scheduling order was not dependent on the filing of a responsive pleading by
 3 defendants.

4 Second, the court is concerned with defendants argument that a scheduling order should not
 5 issue because their motion for summary judgment asserts, among other defenses, qualified immunity.
 6 (See Doc. # 41 at 2, 5.) While a motion based solely on qualified immunity may justify a stay of
 7 discovery, defendants' twenty-five (25) page motion is based on three grounds in addition to qualified
 8 immunity. (See Doc. # 19.) As discussed at the December 23, 2011 status conference, defendants'
 9 Motion for Summary Judgment encompasses some 260 pages of documents, most of which pertain
 10 to the argument that defendants were not deliberately indifferent to plaintiff's medical condition. (See
 11 Minutes at Doc. # 40.) Nonetheless, defendants' object to plaintiff being allowed to conduct any
 12 discovery in order to oppose their motion, characterizing plaintiff's proposed discovery as unnecessary,
 13 duplicative, overbroad, and burdensome, without providing any further explanation of how the
 14 proposed discovery is improper. (Doc. # 41 at 6.)

15 While discovery might not be appropriate if defendants' Motion for Summary Judgment were
 16 solely predicated on qualified immunity, because defendants advance various other arguments, the
 17 interests of justice and Federal Rules of Civil Procedure require the court to allow plaintiff to
 18 undertake discovery to oppose defendants' motion.

19 Although defendants did not seek a protective order, defendants refer to authority that a party
 20 may seek an order staying discovery pending resolution of a potentially dispositive motion. However,
 21 the authority cited by defendants, *Mlejnecky v. Olympus Imaging America, Inc.*, contains an incorrect
 22 citation and does not address the proposition for which it is cited by defendants. Nevertheless, the court
 23 does agree that in certain circumstances, discovery should not be permitted until a motion is resolved.
 24 Typically, however, those cases are limited to a motion to dismiss. *See i.e., Wenger v. Monroe*, 282
 25 F.3d 1068, 1077 (9th Cir. 2002) (approving protective order because substantive component of case
 26 was predicated on a nonreviewable military personnel decision which it found was nonjusticiable).

27 Third, the court disagrees with defendants' characterization of their appearance in this action
 28 as a "Limited Notice of Appearance of Counsel." Defendants did file a Limited Notice of Appearance

1 after entry of the Screening Order. (See Doc. # 7.) However, the court subsequently entered an order
 2 that this case would not be referred to formal mediation, and encouraged the parties to engage in
 3 informal settlement discussions. (Doc. # 8.) The parties each filed a status report indicating that they
 4 failed to reach an informal resolution. (Doc. # 10, Doc. # 12.) Defendants also requested an order
 5 setting a date for them file an answer or other response. (Doc. # 12.) Plaintiff filed a motion for an
 6 order that Defendants be required to answer and for the issuance of a scheduling order. (Doc. # 14.)
 7 Plaintiff also filed a Motion for Physical Examination (Doc. # 15), to which Defendants responded
 8 (Doc. # 17). The court subsequently held a hearing and issued an order that a scheduling order would
 9 be issued. (Doc. # 19.)

10 While “appearance” is not defined in the Local Rules, courts have held that when a party
 11 exercises an intent to litigate a case, that party has entered an appearance. *See New York Life Ins. Co.*
 12 *v. Brown*, 84 F.3d 137 (1996) (holding that an appearance “involves some presentation or submission
 13 to the court[,]” and is “an indication in some way [of] an intent to pursue a defense.” (internal
 14 quotations omitted)); Black’s Law Dictionary (9th ed. 2009) (defining “appearance” as “[a] coming
 15 into court as a party or interested person; esp., a defendant’s act of taking part in a lawsuit, whether
 16 by formally participating in it or by an answer, demurrer, or motion...”); Charles Alan Wright, Arthur
 17 R. Miller, Mary Kay Kane, Richard L. Marcus, *Federal Practice and Procedure*, §2686 (3rd ed. 1998)
 18 (citations omitted) (“An appearance ‘may arise by implication from defendant’s seeking, taking, or
 19 agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other
 20 than one contesting only the jurisdiction...’”); *see also* Doc. # 29 in *Sanchez v. Baker*, 3:11-cv-00310-
 21 LRH (WGC).

22 Although these discussions of what constitutes an “appearance” were in the context of notice
 23 under Federal Rule of Civil Procedure 5(a) and default under Rule 55(b)(2), the analysis nevertheless
 24 provides a workable definition of an “appearance.” In the context of this case, therefore, the defendants
 25 conceivably “appeared” as early as April 18, 2011, when they removed this case to federal court which
 26 set in motion efforts indicating defendants intention to contest the claims. At the latest, defendants
 27 “appeared” on October 17, 2011, when defendants filed a response (Doc. #17) to plaintiff’s
 28 Motion for Physical Examination (Doc. #15).

1 With these preliminary issues in mind, the court turns to defendants' requests in the motion
2 pending before the court. (Doc. # 41.) First, as to the request for a stay of discovery, the court will
3 **defer** any ruling on that request as defendants included the same request in their objection (Doc. # 35)
4 which is currently pending before the Hon. Larry R. Hicks.

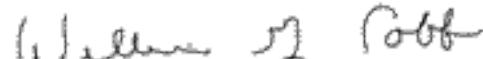
5 The other component of defendants' motion is a request for an enlargement of time to respond
6 to plaintiff's discovery pending resolution of the defendants' objection. This is raised for the first time
7 herein and is not before Judge Hicks. Therefore, the request for an extension of time to respond to
8 plaintiff's discovery until after Judge Hicks rules on defendants' Objection (Doc. #35) is **GRANTED**.
9 As a result, plaintiff's obligation to respond to defendants' Motion for Summary Judgment should be
10 similarly **STAYED**.

11 If the Objection (Doc. # 35) is sustained and a stay of discovery is entered, plaintiff will have
12 **fourteen (14) days** after the district judge enters an order staying discovery to file any opposition to
13 defendants' Motion for Summary Judgment.

14 If, on the other hand, the Objection (Doc. # 35) is overruled and defendants are directed to
15 respond to plaintiff's discovery, then defendants shall have **fourteen (14) days** after the district judge
16 enters such an order to respond to plaintiff's discovery. Plaintiff will then have **fourteen (14) days**
17 after service of defendants' discovery responses on plaintiff to file and serve his response to
18 defendants' Motion for Summary Judgment.

19 **IT IS SO ORDERED.**

20 Dated: December 29, 2011.

21 
22

23

WILLIAM G. COBB
24 UNITED STATES MAGISTRATE JUDGE
25
26
27
28